Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

DAVID A. DONOHOE
OWEN M. JOHNSON, JR.
PAUL B. HEWITT
Akin, Gump, Strauss
Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Petitioner Archer-Daniels-Midland Company

J. RANDOLPH WILSON*
WILLIAM H. ALLEN
CAROL FORTINE
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner Nabisco Brands, Inc.

*Counsel of Record

June 1986

TABLE OF AUTHORITIES

CASES:	Page
Bast v. *United States*, 542 F.2d 893 (4th Cir. 1976)	2
Catlin v. *United States*, 324 U.S. 229 (1945)	4
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	3
In re Corrugated Container Antitrust Litigation, 687 F.2d 52 (5th Cir. 1982)	2
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	2
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981)	4
In re Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985), *cert. granted sub nom. United States* v. *John Doe I, Inc.*, No. 85-1613 (May 27, 1986)	2
In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981)	2
Illinois v. *Abbott & Associates*, 460 U.S. 557 (1983)	2
Illinois v. *F.E. Moran, Inc.*, 740 F.2d 533 (7th Cir. 1984)	2, 3
Socialist Workers Party v. *Grubisic*, 604 F.2d 1005 (7th Cir. 1979)	2, 3
United States v. *Bates*, 627 F.2d 349 (D.C. Cir. 1980)	2
United States v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980), *aff'd sub nom. Illinois* v. *Abbott & Associates*, 460 U.S. 557 (1983)	2
United States v. *Fischbach & Moore, Inc.*, 776 F.2d 839 (9th Cir. 1985)	2, 3
United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983)	7

Table of Authorities Continued

Page

MISCELLANEOUS

The Washington Post, May 28, 1986, p. A16, Col. 3 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1840

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

1. The Government invites the Court's attention to the jurisdictional question that appears on the face of the court of appeals' opinion: whether the district court's order was appealable. The Government is wrong when it describes this "jurisdictional point" as "dispositive" (Br. in Opp. 7). The court of appeals was clearly correct when it took jurisdiction of petitioners' appeal pursuant to 28 U.S.C. § 1291. (Pet. App. 6a-8a.) Courts routinely treat as appealable any order of a district court that approves or disapproves

the disclosure of grand jury secrets to or for the benefit of a litigant in a subsequent civil proceeding.[1]

In some cases the issue of disclosure is presented to the court that empaneled the grand jury and is docketed as a proceeding separate from the civil proceeding. The judgment granting or denying access to the grand jury materials is the final decision in that separate proceeding and therefore is obviously appealable. *Illinois* v. *Abbott & Associates*, 460 U.S. 557, 564 n.9 (1983); see also *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 231-33 (1979) (Rehnquist, J., concurring).

In *Illinois* v. *F.E. Moran, Inc.*, 740 F.2d 533 (7th Cir. 1984), Judge Posner saw that a broader principle than merely the separate docketing of the disclosure proceeding was involved in these cases. In *Moran*, the request for disclosure was made to the judge in the civil case, which was pending in the same district in which the grand jury had sat. In concluding that the order to disclose grand jury testimony was appealable, the Seventh Circuit said, among other things, that its conclusion "gains additional support from the

---

[1] *See, e.g.*, Illinois v. Abbott & Associates, 460 U.S. 557 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); In re Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985), *cert. granted sub nom.* United States v. John Doe I, Inc., No. 85-1613 (May 27, 1986); United States v. Fischbach & Moore, Inc., 776 F.2d 839 (9th Cir. 1985); In re Corrugated Container Antitrust Litigation, 687 F.2d 52 (5th Cir. 1982); In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981); United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980), *aff'd sub nom.* Illinois v. Abbott & Associates, 460 U.S. 557 (1983); Socialist Workers Party v. Grubisic, 604 F.2d 1005 (7th Cir. 1979); Bast v. United States, 542 F.2d 893 (4th Cir. 1976).

'collateral order' doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 740 F.2d at 536. "Indeed," the court continued, "the conclusion is more candidly based on that doctrine than on the fiction that an order granting a Rule 6(e)(3)(C)(i) petition is a 'final decision' just because it disposes of a separately docketed proceeding." *Id.*

The *Cohen* collateral order rationale fits this case as well as it did the *Moran* case. The reason is, as the court below explained, that "[a]ny harm to [petitioners'] interests which are sought to be protected by keeping grand jury proceedings secret cannot be undone by a later reversal of the district court order" allowing the government lawyers to use their retained (and probably refreshed) memories of the grand jury proceeding in this subsequent civil case. (Pet. App. 7a.) Or, as Judge Posner put it in *Moran*, an order allowing the disclosure of grand jury testimony in this kind of proceeding is immediately appealable as a collateral order because otherwise "there will be no possibility of judicial review of the disclosure of the grand jury testimony before that testimony is disclosed and the harm to the public interest in grand jury secrecy done." 740 F.2d at 537.[2]

The gravamen of petitioners' motions denied by the district court was to exact compliance with Rule 6(e)

---

[2] *See also* Socialist Workers Party v. Grubisic, 604 F.2d 1005, 1006-08 (7th Cir. 1979) (order of court in pending civil rights action requiring disclosure of grand jury material appealable under collateral order doctrine); *cf.* United States v. Fischbach & Moore, Inc., 776 F.2d 839, 842 (9th Cir. 1985) (order of grand jury court requiring disclosure of grand jury materials for use in separate civil proceeding appealable under collateral order doctrine).

and to allow the use and consequent disclosure of grand jury secrets only if the procedures of that rule were followed and its substantive standards satisfied. Petitioners asked for dismissal of the complaint without prejudice or for disqualification of the government lawyers only because those seemed in the circumstances the least disruptive but at the same time effective means of enforcing the interest in grand jury secrecy. This Court's decisions that the denial of the usual motion to dismiss for failure to state a claim and the usual lawyer disqualification order are not appealable[3] (Br. in Opp. 7) are therefore not controlling or even especially relevant to the jurisdictional issue.

The Government's "jurisdictional point" is "dispositive" only if one accepts its view of the merits as "dispositive" of what it offers as the nominally separate issue of jurisdiction. If, as petitioners contend, the opportunity that the government lawyers in this case have to use grand jury secrets is disclosure of such secrets within the meaning of Rule 6(e), then this case unquestionably belongs in the category of cases that have uniformly treated disclosure orders as appealable. Moreover, the court of appeals, which disagreed with us on the merits, did not regard its view of the merits as dispositive of jurisdiction. It correctly saw that for jurisdictional purposes this case is properly placed in the category of the disclosure order cases because it implicates the same interests in grand jury secrecy—interests that cannot be vindicated by any subsequent order if the court of appeals

---

[3] Catlin v. United States, 324 U.S. 229 (1945); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

is wrong on the merits and the district court order does allow unauthorized disclosure.

2. The Court has determined to review, in No. 85-1613, the question whether government lawyers in a civil case who had participated in a grand jury proceeding may have continued access to the documents and transcripts that represent and record what was before the grand jury. The only difference between that case and this one is that here the government lawyers who were in the grand jury proceeding and are now handling the civil case profess to have no intention of referring to grand jury documents or transcripts even though such materials are admittedly relevant to the civil case. That is the ground of distinction that the Government urges. (Br. in Opp. 10-12.) The distinction is dubious factually. (See Pet. 19-20.)[4] More important, the Government itself has correctly argued, when its purpose has thereby been served, that the distinction is not legally significant. It decried the decision of the Second Circuit in No. 85-1613 on the ground that "there is no virtue in requiring an attorney to rely on his possibly inaccurate memory when documents are available." (Pet., No. 85-1613, p. 19.) Thus, if the Eighth Circuit is right that the government lawyer may proceed in the civil litigation with his unrefreshed memory, the Sec-

[4] Both courts below found that the government lawyers handling this civil matter have had access to grand jury materials in their office files, whether because of "questionable storage practices" (Pet. App. 13a) or by design. The grand jury investigation has ended, and the empaneling court has rejected all efforts of private litigants to obtain access to the secret grand jury materials. The only known remaining case in which these materials are relevant is this proceeding.

ond Circuit is wrong since there is "no virtue" in denying him access to the documents by which his memory could be refreshed.

The thinness or nonexistence of the distinction between memory refreshed and memory unrefreshed as a threat to the divulgence of data that society has an interest in keeping secret was dramatically illustrated just lately on the first day of the espionage trial of Ronald Pelton. In his opening remarks the prosecutor told the jury that Pelton, who apparently had an extraordinary ability to recall technical information, "didn't go home with stacks of classified documents—what he had was in his head." And what the Soviets got from him was what was in his head. *The Washington Post*, May 28, 1986, p. A16, col. 3.

The Government is wrong on two counts in asserting that reversal of the Eighth Circuit's judgment in this case would "imply the potentially lifelong disqualification of government attorneys who conduct grand jury proceedings from later civil cases involving any of the same entities or the same industry." (Br. in Opp. 11.) The rule for which petitioners contend would have no such dire consequence. What is involved here is not just any grand jury proceeding involving petitioners and an industry of which they were both members but a recent such proceeding that developed data of undoubted relevance to the later civil case. And the grand jury lawyer is not disqualified even in those limited circumstances if the standard of "particularized need" for access to grand jury materials under Rule 6(e)(3)(C)(i) can be satisfied. This Court has pointed out that the standard is "highly flexible" and does not woodenly pretend that government lawyers are just the same as private lawyers.

United States v. *Sells Engineering, Inc.*, 463 U.S. 418, 445 (1983).

CONCLUSION

For the reasons stated in the petition and in this reply brief the petition should be granted and the case heard in tandem with No. 85-1613. The questions presented in the two cases, if not precisely the same, are closely similar. For the Court to have this case before it will improve its perspective on the broad issue left by *Sells* that it has undertaken to resolve. There need be no concern that the Court would be diverted from the merits in this case by the jurisdictional issue. The Government argues that the district court's decision, which upholds the opportunity of the government lawyers to use in this civil case their retained knowledge of grand jury secrets and to have continued access to grand jury documents in their office files, was not appealable. The argument assumes the Government's view of the merits, *i.e.*, that the opportunity for such use and access does not amount to a disclosure within the meaning of Rule 6(e). That is the very question that the Court is asked to decide.

Respectfully submitted,

DAVID A. DONOHOE
OWEN M. JOHNSON, JR.
PAUL B. HEWITT
AKIN, GUMP, STRAUSS
HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Petitioner
Archer-Daniels-Midland
Company

J. RANDOLPH WILSON
WILLIAM H. ALLEN
CAROL FORTINE
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner
Nabisco Brands, Inc.

June 1986